

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT

MEETING SUMMARY - OPEN SESSION

Friday, December 1, 2006
(9:15 am - 5:00 pm)

LA-State Bar Office
1149 South Hill Street, Room 723
Los Angeles, CA 90015
(213) 765-1000

MEMBERS PRESENT: Harry Sondheim (Chair); JoElla Julien (SF); Robert Kehr; Stanley Lampert; Raul Martinez; Kurt Melchior (SF); Ellen Peck; Hon. Ignazio Ruvolo (SF); Jerry Sapiro (SF); Sean SeLegue (SF); Dominique Snyder; Mark Tuft; Paul Vapnek (SF); and Tony Voogd

MEMBERS NOT PRESENT: Linda Foy

ALSO PRESENT: Chris Ames (Office of the California Attorney General); Prof. Carole Buckner (COPRAC/Western State); Chris Carpenter (California District Attorneys Association); Randall Difuntorum (State Bar Staff); Herschel Elkins (Office of the California Attorney General); Patrick Fitzgerald (Assistant United States Attorney); Katherine Flaherty (San Diego District Attorneys Office); Michael Judge (Los Angeles Public Defender/ California Public Defenders Association); Mimi Lee (State Bar Staff); Lauren McCurdy (State Bar staff); Albert Menaster (California Public Defenders Association); Marie Moffat (State Bar General Counsel); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Devallis Rutledge (Los Angeles District Attorneys Office); Ron Smetana (Office of the California Attorney General); Kimberly Wong (Los Angeles Public Defenders Office); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE SEPTEMBER 1, 2006 AND OCTOBER 6, 2006 MEETINGS

The September 1, 2006 action summary was deemed approved. Consideration of the October 6, 2006 summary was postponed to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair welcomed Dominique Snyder as a new member of the Commission. The Chair reminded members to: (1) arrive on-time for the start of meetings; (2) attend meetings at the designated in-person meeting site and only opt for attending at the video conference location after providing notice and an explanation to the Chair; (3) send e-mail messages concerning open session agenda items using the Commission's e-list address: rrc@calbar.org so that Commission members and interested persons can receive messages at the same time; and (4) send such messages as early as possible prior to a meeting.

B. Staff's Report

It was indicated that Commission members who prefer to have staff post their messages to the Commission's e-list should send their messages to Angela Chang (angela.chang@calbar.ca.gov). A message to Angela should specifically request that the e-mail be forwarded to the Commission's e-list.

1. Consideration of 2006 Accomplishments Report

The draft report was approved. It was noted that the revised draft distributed prior to the meeting included a few non-substantive edits from the Chair.

2. Consideration of 2008 Work-Plan

The draft work-plan was approved.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT

A. *CONSENT ITEM*: Proposed Rule 3.1 [Rule 3-200]. Meritorious Claims and Contentions

This matter was called for discussion by the Chair to discuss only those issues timely raised in response to Mr. Tuft's November 2, 2006 report and recommendations on the public comment received on proposed Rule 3.1. Mr. Tuft's language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission's consent agenda procedure.

The Chair first raised a member's recommendation that the entire rule not be adopted. There was no support for this recommendation. Next, the Chair called for discussion of drafting issues and the following decisions were made.

(1) In Cmt.[2], the citations to Civil Code sec. 128.5 and 128.6 were deleted and the citation to Civil Code sec. 128.7 was corrected to be a reference to the Code of Civil Procedure (6 yes, 0 no, 2 abstain).

(2) In Cmt.[2], the citation to *Zamos v. Stroud* (2004) 32 Cal.4th 958 was deleted and the penultimate sentence was revised to read: "This Rule also prohibits a lawyer from continuing an action after the lawyer knows that there is no basis in law or fact for doing so that is not frivolous." (4 yes, 1 no, 2 abstain)

(3) There was no objection to revising Cmt.[4] to read: "This Rule is intended to apply to proceedings of all kinds, including appellate and writ proceedings."

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. Staff was asked to note for the record that the rule is intended to use an objective standard for ascertaining a lawyer's knowledge regarding a legal and factual basis for a client's action or defense. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

**B. *CONSENT ITEM: Proposed Rule 8.1 [Rule 1-200]. False Statement
Regarding Admission to the State Bar***

This matter was called for discussion by the Chair to discuss only those issues timely raised in response to the codrafters' November 7, 2006 report and recommendations on the public comment received on proposed Rule 8.1. The codrafters' language changes that were not the subject of a timely raised comment were deemed approved pursuant to the Commission's consent agenda procedure. Regarding the issues raised, the following decisions were made.

(1) In paragraph (c), the phrase "in California or elsewhere" was added at the end of the last sentence (5 yes, 4 no, 1 abstain). A recommendation to make a corresponding change to proposed Rule 8.1.1 to add "in California or elsewhere" was not approved (2 yes, 6 no, 0 abstain).

(2) In Cmt.[2], there was no objection to deleting the redundant references to certain admission or certification activities, as they appear to be typographical errors.

(3) In Cmt.[2], there was no objection to changing the citations to the Rules of Court to use the new numbering system that became operative in 2007.

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

C. *CONSENT ITEM:* Proposed Rule 8.1.1 [Rule 1-110]. Disciplinary Authority of the State Bar

This matter was not called for discussion. Pursuant to the Commission's consent agenda procedure, proposed Rule 8.1.1 was deemed approved with the addition of: (1) the new Rule of Court numbering operative 2007 for the Rule of Court cited in Cmt.[1]; and (2) minor revisions provided in Mr. Kehr's November 10, 2006 e-mail message. With these revisions, proposed Rule 8.1.1 reads:

Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

A lawyer shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, or public or private reproof.

Comment

[1] Other provisions also require a lawyer to comply with conditions of discipline. (See e.g. Bus. & Prof. code §6068, subdivision (k) & (i); Cal. Rule of Court 9.19(b).)

[Intended Hard Page Break]

D. Proposed Rule 1.8.8 [Rule 3-400] Limiting Liability to Client

The Commission considered a revised draft of proposed Rule 1.8.8 (Draft #4, dated 11/2/2006). Mr. Kehr led a discussion of the changes recommended by the drafting team and the issues raised in messages from Mr. Sapiro and Mr. Tuft. The following drafting decisions were made during the discussion.

(1) In Cmt.[1], the Commission considered but did not approve a recommendation to restore the last two sentences that were deleted in accordance with the report and recommendations of the codrafters (2 yes, 8 no, 0 abstain).

(2) In Cmt.[2], the Commission considered but did not approve a recommendation to add citations to the codes and rules concerning limited liability partnerships and law corporations (4 yes, 4 no, 2 abstain).

(3) In Cmt.[2], the codrafters' recommendation to delete the placeholder sentence referring to the State Bar's proposed rule on insurance disclosure was approved (9 yes, 1 no, 0 abstain).

(4) In Cmt.[3], the two sentences in this comment were revised and combined into one sentence that includes a reference to B&P Code section 6090.5 (10 yes, 0 no, 0 abstain). The revised language reads:

"[3] Paragraph (b) is not intended to override obligations the lawyer may have under other law. See, e.g., Business and Professions Code § 6090.5."

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

E. Proposed Rule 1.8.10 [Rule 3-120]. Sexual Relations With Client

The Commission considered a October 20, 2006 codrafters' report and recommendations on the public comment received on proposed Rule 1.8.10. In this report, the codrafters' recommended that the public comment version of the rule be approved without any changes. A vote taken to approve this recommendation was defeated (6 yes, 7 no, 0 abstain) and the Chair next called for a discussion of the written comments and testimony recommending that the public comment version of the rule be completely revised to track MR 1.8(j).

In the course of discussing the possible adoption of the policy reflected in MR 1.8(j), it was observed that the ABA's rule is essentially a complete ban on sexual relations while the California rule is a lesser restrictive alternative to a ban. It was also observed that a California version of the ABA rule might be vulnerable to constitutional challenge since the California Constitution includes an explicit right of privacy. It was suggested that the Commission should consider seeking advice of the State Bar's Office of General Counsel as part of its consideration of a possible rule similar to MR1.8(j).

Regarding the exploration of a rule similar to MR 1.8(j), a recommendation was approved to revise the public comment version of proposed Rule 1.8.10 with MR 1.8(j) as the starting point for the next draft (8 yes, 6 no, 0 abstain). Next, two additional recommendations for redrafting were approved: a recommendation to include paragraph (a) of the public comment version of the rule in the next draft (10 yes, 4 no, 0 abstain); and a recommendation to include paragraph (d) of the public comment version of the rule in the next draft (9 yes, 5 no, 0 abstain).

Mrs. Julien, Mr. Lamport, Mr. Melchior, Mr. Sapiro and Mr. Tuft each requested that their dissent to the majority's approach to revising the rule be noted in the meeting summary.

Ms. Peck volunteered to join the codrafter team to work on the next draft. The Chair invited interested Commission members to offer their own comments on the constitutionality issue.

(NOTE: At a later time during the meeting, the Chair sought clarification of whether it was the sense of the Commission to put further drafting on hold or to continue drafting while awaiting legal advice. As there were contrary views expressed about this issue based on the initial decision to seek advice, the Chair asked staff to use a 10-day ballot procedure to ascertain the sense of the Commission on the option of seeking legal advice.

After the meeting, staff circulated the requested 10-day ballot with a deadline of December 14, 2006. There were 5 votes in favor of seeking advice while continuing to work on the rule, 3 votes against, and 7 members who did not respond to the 10-day ballot. In accordance with the results of the vote, Commission leadership instructed staff to submit a request for advice to the Office of General Counsel which was submitted on January 12, 2007.)

[Intended Hard Page Break]

F. Proposed Rule 5.1 [Rule 1-310X]. Responsibilities of Partners, Managers, and Supervisory Lawyers

The Commission considered a November 2, 2006 report and recommendations on the public comment received on proposed Rule 5.1. The Chair welcomed Los Angeles Public Defender Michael Judge who provided oral comments in support of previously provided written comments and testimony. Among the comments offered by Mr. Judge was a strong recommendation that the definition of supervisor and concept of “comparable managerial authority” be clarified. Mr. Tuft led a discussion of the public comments and testimony received and the revisions recommended in response to the public comments. The following drafting decisions were made.

(1) The public comment version of proposed Rule 5.1(a) was referred to the codrafters to consider possible changes that might abrogate concerns that the rule is unenforceable due to the vagueness and overbreadth of the language used in paragraph (a) (6 yes, 5 no, 0 abstain).

(2) The public comment version of proposed Rule 5.1(b) was referred to the codrafters to work with the Rule 1.1 drafting team to resolve the issue of an overlap with the duty to supervise that is present in the current draft of the competence rule. A straw vote was taken to guide the drafters and there were 8 members in favor of placing the duty to supervise in Rule 5.1(b), 1 member in favor of keeping the duty in Rule 1.1 and 2 members who abstained.

(3) There was no objection to the drafters adding a new comment to paragraph (b) stating that nothing in that paragraph is intended to create vicarious exposure for supervisors.

(4) There was no objection to deeming paragraph (c) approved subject to the anticipated revisions of paragraphs (a) and (b).

A redraft was requested for the next meeting. The Chair encouraged members to send suggestions to the drafting team, particularly on paragraph (a) to assist the drafting team in addressing concerns about vagueness and overbreadth.

[Intended Hard Page Break]

G. Proposed Rule 5.2 [Rule 1-310X]. Responsibilities of Subordinate Lawyer

The Commission considered a November 2, 2006 report and recommendations on the public comment received on proposed Rule 5.2. Michael Judge provided oral comments in support of previously provided written comments and testimony. Specifically, Mr. Judge underscored that the California Public Defenders Association unanimously opposes importation and tacit approval of ABA Formal Opinion No. 06-441 through the State Bar's adoption of the Commission's proposed Rule 5.2. Mr. Tuft led a discussion of the public comments and testimony received and the revisions recommended in response to the public comments. The following drafting decisions were made.

(1) In Cmt.[1], there was no objection to: deleting the word "necessarily" from the second sentence; and adding the phrase "or the Act" at the end of that sentence.

(2) In Cmt.[2], the Commission considered but did adopt the addition of the phrase "to the particular supervisory lawyer directing the subordinate lawyer" at the end of the last sentence (3 yes, 8 no, 0 abstain). Also, the Commission considered but did not adopt a recommendation that the last sentence be moved from the comments to the rule text (2 yes, 9 no, 0 abstain).

(3) There was no objection to the codrafters adding a new comment to either or both Rule 5.1 and 5.2 that refers lawyers to the California Indigent Defense Guidelines.

In addition to the foregoing, the suggested correction of typographical errors identified in the November 2, 2006 report were deemed approved. Also, Ms. Snyder volunteered to distribute a link to a New Mexico Supreme Court decision involving court criticism of a firm's management for failing to properly supervising a subordinate lawyer. Matter of Estrada, 143 P.3d 731 (N.M. 2006)

The Chair asked the drafting team to implement all of the changes in a revised draft but it was understood that no vote would be taken to approve the entire rule until after the Commission has completed its work on Rule 5.1.

[Intended Hard Page Break]

H. Proposed Rule 5.3 [Rule 1-300]. Nonlawyer Assistants

The Commission considered a November 2, 2006 report and recommendations on the public comment received on proposed Rule 5.3. Mr. Tuft noted an issue raised by BASF concerning the phrase used in Rule 5.3 Cmt. [1] (“confidential information”) to refer to information covered by B&P Code sec. 6068(e)(1). There was no objection treating this issue as a global issue impacting all instances throughout the rules where that language is used. It was agreed that the language “confidential information” and similar references would be placed in brackets until the Commission considers language that would work globally. After discussion of this issue, the Commission elected to postpone further discussion of Rule 5.3 until the drafters have had a chance to revise Rule 5.1. The Chair indicated that Rules 5.1, 5.2 and 5.3 would be handled as a joint proposal because of the interrelationship of those rules.

[Intended Hard Page Break]

IV. MATTERS FOR ACTION

A. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client

Matter carried over.

[Intended Hard Page Break]

B. Consideration of Rule 4-210 [ABA MR 1.8(e)] Payment of Personal or Business Expenses Incurred by or for a Client

Matter carried over.

[Intended Hard Page Break]

C. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].

Matter carried over.

[Intended Hard Page Break]

D. Consideration of Rule 1.8.1 [Rule 3-300]. Avoiding Interests Adverse to a Client

Mr. Lamport presented Draft 5 of proposed Rule 1.8.1 (dated October 13, 2006). The Chair indicated that there were no objections to accepting the minor, non-substantive changes recommended by Mr. Kehr (item nos. 2, 4, and 5 in Mr. Kehr's November 28, 2006 message). In the rule text, paragraph (b) was revised as follows: "(b) The client is either represented by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice, and is given a reasonable opportunity to seek that advice." (8 yes, 0 no, 1 abstain).

The Chair next called for a discussion of the issues on the proposed comments to the rule. However, the Chair deferred consideration of any issues raised on Cmt.[8] to allow more time for members to study it. In Cmt.[10], the word "affiliated" was deleted from the second sentence (7 yes, 1 no, 1 abstain). It was understood that the codrafters could add language explaining that any definition of an independent counsel under the rule would be a fact specific determination. There was no objection to the Chair's recommendation that the Rule 1.8.1 comments not address the issues, if any, that arise from the ex parte communication that a lawyer might have when seeking client consent to a business transaction from a client who is represented on that business transaction by another attorney.

A redraft was requested for the next meeting.

[Intended Hard Page Break]

E. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

Consideration of this agenda item was specially set for 11:00 a.m. to accommodate the attendance of interested persons. The Commission considered a November 3, 2006 codrafter memorandum reporting on efforts to reach a consensus on language addressing communications authorized by law in light of the proposed change from “party” to “person.” The Chair welcomed the following visitors who indicated an interest in addressing the Commission on this issue: Chris Ames (Office of the California Attorney General); Chris Carpenter (California District Attorneys Association); Herschel Elkins (Office of the California Attorney General); Patrick Fitzgerald (Assistant United States Attorney); Katherine Flaherty (San Diego District Attorneys Office); and Albert Menaster (California Public Defenders Association); Devallis Rutledge (Los Angeles District Attorneys Office); and Ronald Smetana (Office of the California Attorney General).

The Chair began by taking a vote to ascertain the Commission’s interpretation of the existing RPC 2-100 “authorized by law” exception. Specifically, the issue posed was: “If a prosecutor has a good faith belief that the development of the law would permit him or her to communicate with a represented person, should that prosecutor be disciplined because that view was not currently reflected in an existing case?” In response to this question, 1 member said “yes,” and 8 members said “no.” Based on this consensus vote, the Chair suggested that any version of the exception should make clear that good faith extensions of the law are within the exception.

Next, the Chair asked the codrafters to report on their efforts to reach consensus on this issue. The codrafters then led a general discussion of the “authorized by law” exception and the “party” to “person” proposed amendment and this general discussion included much helpful input from the interested persons who were in attendance. Among the points raised during this discussion were the following:

(1) Case law does not address the issue of investigatory contacts by explicitly stating that conduct is or is not “authorized.” Thus, a rule that uses the term “authorized,” as opposed to “permitted,” by law is imprecise and can lead to confusion.

(2) Similar to prosecutors, a defense lawyer has a right to investigate their case by contacting a represented witness and this right needs to be covered by any exception.

(3) In the last 40 years of law enforcement consumer protection efforts, there have been many accepted practices that have never been challenged or condemned but there might not be a specific case that affirmatively describes such practices as authorized. The absence of specific authorization becomes a problem when “party” is changed to “person” and the only exception is articulated as an “authorized by law” exception.

(4) Under rules like RPC 2-100, the phrase “authorized by law” is a term of art. Cases make clear that there are no categorical areas of authorized conduct and that even the pre v. post indictment standard is not dispositive. Instead, case law serves as a source of legal authority for case by case decisions on what is or is not covered by the exception.

(5) Consideration should be given to deleting any and all case citations because none of the cases adequately convey the point that the applicability of an “authorized by law” exception is not dependent on whether a specific case can be cited that precisely applies to the ex parte contact which is at issue.

(6) Like prosecutors, civil practitioners must interpret case law to determine whether RPC 2-100 applies in a given setting (i.e., contact with former or current employees of a represented corporation). It is not an undue burden to require lawyers to study the law before engaging in conduct that might violate RPC 2-100.

(7) If attempts to develop a workable exception fail, then the Commission should seriously consider revisiting its prior vote to change “party” to “person.”

(8) Placing prosecutors in the position of having to make case by case decisions on whether to interview a witness is not acceptable when a wrong decision could mean that a serial killer’s conviction is reversed.

(9) Seeking a court order is the safe option when a prosecutor is in a grey area.

(10) As a practical matter, the court order option is not a meaningful alternative. In the course of a typical law enforcement proceeding, there will be no time, resources or opportunity to obtain such an order with the result being that: (1) represented witnesses will not be interviewed; and (2) the efforts of both prosecutor and defense counsel to make the system work will have been frustrated.

(11) Access to the victim in criminal proceeding is critical. A victim is not a “party” in such proceedings but often they are “persons” represented by counsel.

(12) Consideration should be given to developing a new rule comment stating that the change from “party” to “person” is not intended to change the existing law concerning contacts with represented persons made in the course of law enforcement investigations.

(13) In some states that have made the change from “party” to “person,” there has been some action taken to clarify the extent of permitted law enforcement activities.

(14) As a result of the *Dale* decision, California may now need to confront the challenge of specifically stating the extent of permitted law enforcement activities.

Following discussion, they agreed that the codrafters should attempt a redraft that implements the following concepts: (1) the current RPC 2-100 discussion section language stating that “[o]ther applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law”; (2) a new comment explaining that the change from “party” to “person” is not intended to diminish, expand or in any way alter the substantive law regarding when communications in connection with investigative activities are permitted and when they are not permitted; and (3) a new comment, similar to D.C. RPC 4.2 Cmt.[12], indicating that the “authorized by law” exception is not intended to freeze any

particular substantive law, but is meant to accommodate substantive law as it may develop over time. (10 yes, 3 no, 0 abstain.)

F. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

Matter carried over.

[Intended Hard Page Break]

G. Consideration of Rule 4-200 [ABA MR 1.5] Fees for Legal Services

Matter carried over.

[Intended Hard Page Break]